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SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. ~~1042~~ 161

STATE OF FLORIDA ex rel
DAVID MOLIVER,

Petitioner,

vs.

HONORABLE GENE WILLIAMS, as one of the
Judges of the Criminal Court of Record of
Dade County, Florida,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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SUBJECT INDEX

	Page
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	9
APPENDIX A — Opinion Below	App. 1
APPENDIX B — Florida Statutes §877.02 (1)	App. 10
APPENDIX C — Fourteenth Amendment United States Constitution	App. 11
APPENDIX D — First Amendment United States Constitution	App. 11
APPENDIX E — Fifth Amendment United States Constitution	App. 12

AUTHORITIES

CASES	Page
Brotherhood of Railroad Trainmen v. Virginia ex rel Virginia State Bar, 377 U. S. 1, 84 S. Ct. 1112, 12 L. Ed. 2d 89	3
Brown v. Board of Education, 347 U. S. 483	4
Cramp v. Board of Public Instruction of Orange County, Florida, 368 U. S. 278, 7 L. Ed. 2d 285, 82 S. Ct. 275	4
In re Cohn, 100 Ill. 2d 186, 139 N. E. 2d 301, 306	7
In re Mitgang, 52 N. E. 2d 807, 816	7
National Association for the Advancement of Colored People v. Button, 371 U. S. 415, 83 S. Ct. 328, 9 L. Ed. 405	4

STATE STATUTES	
Florida Statutes §877.02 (1)	4

CONSTITUTIONAL PROVISIONS	
Amendment I, United States Constitution	App. 11
Amendment V, United States Constitution	App. 12
Amendment XIV, United States Constitution	App. 11

SUPREME COURT OF THE UNITED STATES

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HONORABLE GENE WILLIAMS, as one of the Judges of the Criminal Court of Record of Dade County, Florida,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, DONALD F. FARBER, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida entered in this case on February 23, 1966.

OPINIONS BELOW

The Opinion of the Supreme Court of Florida (infra Appendix A, Pages App. 1-10) is reported at 183 So. 2d 537.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on February 23, 1966. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved in this case are as follows:

1. Florida Statutes Section 877.02(1) (infra Appendix B, App. Pages 10-11).

2. The Fourteenth Amendment to the Constitution of the United States (infra Appendix C, App. Page 11).

3. The First Amendment to the Constitution of the United States (infra Appendix D, App. Pages 11-12).

4. The Fifth Amendment to the Constitution of the United States (infra Appendix E, App. Page 12).

STATEMENT OF THE CASE

The petitioner was indicted on April 22, 1965 by the Dade County Grand Jury, Fall Term 1964, for solicita-

tion of legal services. The indictment set forth, generally, that the petitioner did unlawfully and intentionally, directly or indirectly, solicit legal business of or from William David McDaniels and Laura McDaniels his wife, as natural parents and natural guardians and on behalf of their son, Bert Lee McDaniels, a minor, or procure through solicitation of William David McDaniels and Laura McDaniels a retainer authorizing an attorney to render legal services. An information was filed against the petitioner in the Criminal Court of Record of Dade County, Florida, which information was based upon facts alleged in the indictment as hereinabove set forth. The petitioner filed in the Criminal Court of Record of Dade County his Motion To Quash Information upon the grounds, inter alia, that Florida Statutes 877.02 (1), under which the information was filed, is void and unconstitutional; that the statute violates the provisions of the First, Fifth and Fourteenth Amendments to the United States Constitution in that the statute is too vague, indefinite and ambiguous to sufficiently define the acts which will constitute a criminal offense; that the statute unduly inhibits the constitutionally protected rights of speech and association; and that the statute deprives petitioner of the equal protection of the laws.

The Motion to Quash was denied by the Criminal Court of Record of Dade County. Petitioner thereupon filed his Suggestion for Writ of Prohibition with the Supreme Court of Florida, which Suggestion alleged the unconstitutionality of the said Florida Statutes §877.02 (1) under the provisions of the First and Fifth and Fourteenth Amendments to the United States Constitution as specifically applied by this Court in **Brotherhood of Railroad Trainmen vs. Virginia ex rel Virginia State Bar,**

377 U. S. 1, **National Association for the Advancement of Colored People vs. Button,** 371 U. S. 415, and **Cramp vs. Board of Public Instruction of Orange County,** 368 U. S. 298.

On February 23, 1966 the Supreme Court of Florida entered its decision which is hereby sought to be reviewed. In its Opinion the Supreme Court of Florida ruled the said §877.02 (1) to be valid and rejected the petitioner's contentions that the said statute is unconstitutional under the First, Fifth and Fourteenth Amendments to the United States Constitution.

REASONS FOR GRANTING THE WRIT

Florida Statutes §877.02 (1) provides

> "It shall be unlawful for any person or his agent, employee or any person acting on his behalf, to solicit or procure through solicitation either directly or indirectly legal business, or to solicit or procure through solicitation a retainer, written or oral, or any agreement authorizing an attorney to perform or render legal service, . . ."

This statute, like the Virginia statute ruled upon in **National Association for the Advancement of Colored People vs. Button, supra,** was adopted subsequent to this Court's decision in **Brown vs. Board of Education,** 347 U. S. 483. As noted by Justice Douglas in his concurring opinion in **National Association for the Advancement of Colored People vs. Button, supra,**

> "The amendments to Virginia's code, here in issue, were enacted in 1956. Arkansas, Florida, Georgia, Mississippi, South Carolina, and Tennessee also passed laws following our 1954 decision which brought within their barratry statutes attorneys paid by an organization such as the N.A.A.C.P. and representing litigants without charge."

Like its Virginia counterpart, the Florida statute has the objectionable qualities of vagueness and overbreadth which render it susceptible of sweeping and improper application in the area of First Amendment freedoms. Although the Florida Supreme Court stated in its Opinion,

> "The object of §877.0 (1) is to prohibit the solicitation of legal business by an attorney directly or by his agent or employee, or by another acting in his behalf,"

the fact remains that the vague and broad Florida statute lends itself to selective enforcement against unpopular causes.

The Petition for Writ of Certiorari should be granted for the following reasons:

A. In deciding that Florida Statutes §877.02(1) is constitutional the Florida Supreme Court has decided a federal question of substance in a way not in accord with applicable decisions of this Court.

(1) The decision of the Florida Supreme Court is

repugnant to the decision of this Court in **Cramp vs. Board of Public Instruction of Orange County, Florida,** 368 U. S. 278.

It is the petitioner's contention that the provisions of Florida Statutes §877.02(1) are so vague and indefinite as to render the statute unconstitutional. The vagueness of the statute manifests itself not only with respect to the persons who may be held criminally liable under the statute but, also, and most glaringly, with respect to the meaning of "indirect" solicitation of legal business.

A statute which forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. In **Cramp v. Board of Public Instruction of Orange County, Florida,** 368 U. S. 278, 7 L. Ed. 2d 285, 82 S. Ct. 275, this Court held to be unconstitutional a Florida Statute which required each employee of the state to execute a written oath in which he must swear that he has never lent his "aid, support, advice, counsel or influence to the Communist Party." This Court, after pointing out the absurd possibilities to which the statutory phrases could be applied, stated:

> "In light of our decisions, it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague or indefinite as to be no rule or standard at all."

The petitioner submits that the phrase "indirect solicitation of legal business" has no determinative meaning and that the language is so general and indefinite as to embrace not only acts which might be legally punishable but also others which are perfectly proper and cannot be punished. What is the meaning of "indirect solicitation of legal business" which this statute purports to make a crime? Certainly an attorney indirectly solicits legal business in many and varied ways which are perfectly proper and ethical. By his devotion to his duty, by his contributions to his profession, by his distinguished conduct in the community, the attorney indirectly solicits legal business. Yet, this statute makes him a criminal for doing so. Numerous decisions and articles have also recognized that there are perfectly proper means of solicitation of legal business. See **In re Cohn**, 100 Ill. 2d 186, 139 N. E. 2d 301, 306; **In re Mitgang**, 52 N. E. 2d 807, 816.

Thus, the petitioner submits that neither he, nor this court, nor any person, can state at what point, under this statute, indirect solicitation of legal business ceases to be ethical and becomes criminal. The statute purports to condemn all manner of indirect solicitation of legal business, but the standard of guilt as to what constitutes criminal solicitation is not supplied.

(2) The decision of the Florida Supreme Court is repugnant to the decisions of this Court in **Brotherhood of Railroad Trainmen vs. Virginia ex rel Virginia State Bar**, 377 U. S. 1, and **National Association for the Advancement of Colored People vs. Button**, 371 U. S. 415.

This Court has specifically approved a form of con-

duct which would be illegal under the statute in question. In **Brotherhood of Railroad Trainmen vs. Virginia ex rel Virginia State Bar,** 377 U.S. 1, 84 S. Ct. 1113, 12 L. Ed. 2d 89, this Court held that an injunction which prohibited a labor union from advising injured members to obtain legal advice and recommending specific lawyers violated the provisions of the First and Fourteenth Amendments to the United States Constitution. Under the Florida Statute in question such conduct would be illegal. Thus, we have an affirmative ruling by this Court that certain conduct condemned by the Florida statute is constitutionally protected and cannot, therefore, be the basis for a criminal prosecution. The decision of this Court in the case of **National Association for the Advancement of Colored People vs. Button,** 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 405, establishes, further, that a state statute is unconstitutional where such statute purports to make it a crime for a person to advise another that his legal rights have been infringed and refers him to a particular attorney. The Florida statute in question does purport to make such act a crime and is therefore unconstitutional.

B. By adjudicating §877.02(1) to be valid the Florida Supreme Court is tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.

The vagueness and overbreadth of §877.02(1) has already been demonstrated. This Court in **National Association for the Advancement of Colored People vs. Button, supra,** stated, at page 443.

> "The objectionable quality of vagueness and overbreadth does not depend upon absence of fair

notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application."

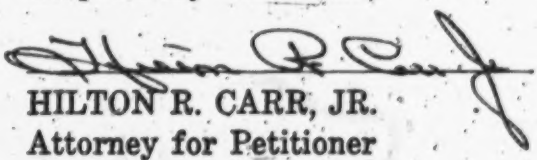
As indicated by Justice Douglas, the decision in **Brown vs. Board of Education, supra,** spawned a progency of state statutes designed to restrict legal assistance to unpopular causes. One of the progency has been eliminated by this Court. However, the Florida Supreme Court has declined to invalidate the Florida offspring. So long as §877.02(1) continues on the statute books, the courts of Florida, and this Court, are permitting the dangerous existence of a penal statute susceptible of sweeping and improper application in the area of First Amendment freedoms. The law of **National Association for the Advancement of Colored People vs. Button, supra,** requires that §877.02(1) meet the same fate as its Virginia counterpart and be declared unconstitutional.

CONCLUSION

The decisions of this Court hereinabove referred to clearly establish the unconstitutionality of Florida Statutes §877.02(1). In order to provide full protection for First Amendment freedoms against possible restrictions by this vague and broad statute a writ of certiorari should issue to the Supreme Court of Florida to the end that the

decision sought to be reviewed may be reversed by this Court and Florida Statutes §877.02(1) declared unconstitutional.

Respectfully submitted,



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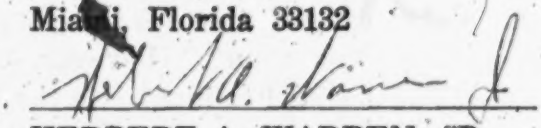

HERBERT A. WARREN, JR.
Attorney for Petitioner
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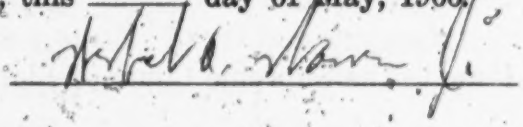
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari was mailed to HONORABLE EARL FAIRCLOTH, Attorney General, State of Florida, State Capitol Building, Tallahassee, and to RICHARD E. GERSTEIN, State Attorney, 1351 N.W. Twelfth Street, Miami, Florida, this 20 day of May, 1966.



APPENDIX

APPENDIX A

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1966

CASE NO. 34,499

STATE OF FLORIDA, ex rel.
DAVID MOLIVER,

Petitioner,

vs.

HONORABLE GENE WILLIAMS, as one of the Judges of the Criminal Court of Record of Dade County, Florida,

Respondent.

Opinion filed February 23, 1966
Case of original jurisdiction — Prohibition

Carren & Warren, for Petitioner
Richard E. Gerstein, for Respondent

PER CURIAM,

By suggestion for a writ of probition this Court is asked to review a certain proceeding in the Criminal Court of Record of Dade County, Florida, wherein Petitioner is a defendant in a criminal prosecution by the State of Florida.

It is our conclusion that the suggestion be denied on authority of State ex rel. Farber, Petitioner, vs. Honorable Gene Williams, as one of the Judges of the Criminal Court of Record of Dade County, Florida, Respondent, opinion filed February 23, 1966.

THORNAL, C. J., THOMAS, O'CONNELL, CALDWELL and ERVIN, J. J., concur

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1966

CASE NO. 34,500

STATE EX REL. FARBER,

Petitioner,

vs.

HONORABLE GENE WILLIAMS, as one of the Judges of the Criminal Court of Record of Dade County, Florida,

Respondent.

Opinion filed February 23, 1966
Case of original jurisdiction — Prohibition

Carr & Warren, for Petitioner
Richard E. Gerstein, for Respondent

ERVIN, J.

Petitioner seeks a writ of prohibition from us directed to the Criminal Court of Record of Dade County to prohibit the prosecution of Petitioner therein for the alleged violation of § 877.02(1), F.S. The Dade County Grand Jury indicted Petitioner, alleging that the Petitioner contrary to statute did unlawfully and intentionally, directly or indirectly, solicit legal business of and from

William David McDaniels and Laura McDaniels, his wife, as natural parents and natural guardians and on behalf of their son, Bert Lee McDaniels, a minor, or procure through solicitation of said William David McDaniels, and Laura McDaniels a retainer authorizing an attorney to render legal service.

The bases upon which the writ is sought are: (1) that the Dade County Grand Jury is void and unconstitutional because the statutes creating and establishing it were enacted contrary to the Florida Constitution and (2), § 877.02(1), F.S., the statute purporting to make it a criminal offense to solicit legal business, is unconstitutional.

The contention that the Dade County Grand Jury is without constitutional status was recently rejected by us. See State ex rel. Worthington v. Cannon, opinion filed December 8, 1965, rehearing denied January 19, 1966.

Section 877.02(1), F. S., reads as follows:

"(1) It shall be unlawful for any person or his agent, employee or any person acting on his behalf, to solicit or procure through solicitation either directly or indirectly legal business, or to solicit or procure through solicitation a retainer, written or oral, or any agreement authorizing an attorney to perform or render legal service, or to make it a business to solicit or procure such business, retainers or agreements; provided, however, that nothing herein shall prohibit or be applicable to banks, trust companies, lawyer reference services, legal aid associations, lay col-

lection agencies, railroad companies, insurance companies and agencies, and real estate companies and agencies, in the conduct of their lawful businesses, and in connection therewith and incidental thereto forwarding legal matters to attorneys at law when such forwarding is authorized by the customers or clients of said businesses and is done pursuant to the canons of legal ethics as pronounced by the supreme court of Florida,"

Petitioner contends said section is void and unconstitutional because it violates Section 12 of the Declaration of Rights of the Florida Constitution, and the First, Fifth and Fourteenth amendments to the United States Constitution, in that the statute is too vague, indefinite and ambiguous to sufficiently define the acts which will constitute a criminal offense; that the statute unduly inhibits the constitutionally protected rights of freedom of speech and association, and that the statute deprives Petitioner of equal protection of the laws.

Petitioner in his argument relies upon Cramp v. Board of Public Instruction of Orange County (Fla.), 368 U.S. 278, 7 L. Ed. 2d 285, 82 S. Ct. 275, holding that when a statute forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application, it violated due process. He also relies upon Locklin v. Pridgeon, 158 Fla. 30 So. 2d 102, which holds that when a statute uses words of no determinative meaning and its language is so general and indefinite as to embrace not only acts properly and legally punishable but others which cannot be punished, it will be declared void for

uncertainty. Petitioner contends that § 877.02(1), F.S., is so broad it prohibits a friend, acquaintance or client of an attorney from recommending him to another. He cites Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1, 87 S. Ct. 1113, 12 L. Ed. 2d 89, to the effect a labor union could not be enjoined by a state bar association from advising its injured members to obtain legal advice from specific lawyers it recommended. National Association for Advancement of Colored People v. Button, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405, is cited also; it held a statute unconstitutional which made it a crime for a person to advise another that his legal rights have been infringed and refer him to a particular attorney.

Section 877.02(1) does not appear to us to be unconstitutionally vulnerable on the bases of the challenges urged by Petitioner.

The object of § 877.02(1) is to prohibit the solicitation of legal business by an attorney directly or by his agent or employee, or by another acting in his behalf. It does not prohibit the recommendation of an attorney by anyone to another where the one recommending has no relationship or privity with the attorney as the latter's agent or as his employee or other similar relationship with the attorney for the purpose of soliciting legal business for him. Thus the statute does not prohibit the recommendation of an attorney by a mere volunteer or acquaintance who has no prior and continuing relationship as agent or employee or similar status with the attorney recommended which contemplates solicitation of legal business for the attorney.

The statute is a criminal statute version of some of the following quoted language from Section 28 of the Canons of Professional Ethics adopted by this Court governing the legal profession:

> "28. **Stirring Up Litigation, Directly or Through Agents.** "It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit or collect judgment, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital attaches or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. A duty to the public and to the profession devolves upon every member of the Bar having knowledge of such practices upon the part of any practitioner immediately to inform thereof, to the end that the offender may be disbarred."

In 5 Am. Jur., Attorneys at Law, §2, page 262, it is stated:

> § 2. **Regulation of Practice of Law.** — The practice of law is affected with a public interest, and it is both the right and duty of the state to regulate and control it so that the public welfare will be served and promoted; the legislature has the power to declare acts of unauthorized practice of the law illegal and punishable by fine or imprisonment, yet there is an inherent power in the courts to control and supervise the practice of law generally, whether in or out of court, notwithstanding the acts of the legislature in exercise of its power."

Also in 5 Am. Jur., Attorneys at Law, § 274, on pages 425 and 426, the text reads:

> "§ 274. **Solicitation of Business.** — An attorney may be suspended or disbarred for the solicitation of employment, either personally or through others, particularly when employment is solicited in personal injury cases. Statutes have been held valid which declare that an attorney who seeks or obtains employment in any action suit, or case by means of solicitation either personally or through others shall be disbarred, even though such statutes are limited in their application to personal injury cases. Some courts recognize a distinction between personal solicitation and the employment of agents and runners to solicit business and stir up litigation, holding the latter act much more reprehensible and calling for

disbarment even though the first may not justify such punishment. . . ."

In 3 Fla. Jur., Attorneys at Law, § 94 (pp. 424 and 425) the text reads:

"§ 9. **Solicitation of Business.** — "An attorney may be disciplined for the solicitation of employment, either personally, or through others, particularly when employment is solicited in personal injury actions. The ban against soliciting professional services by lawyers, either by advertising or by touter, had its origin early in the traditions of the English Bar." [See also footnotes 17, Lambdin v. State (1942) 150 Fla. 814, 9 So. 2d 192; 19, 5 Am. Jur., Attorneys at Law § 274, Annot. 14 ALR 2d 740; 20, State ex rel. Florida Bar v. Murrell (1954, Fla.) 74 So. 2d 221.]

As interpreted above, we do not find the statute to be violative of the State or Federal Constitution. Section 877.02(1), F.S., falls in the class of acts **mala prohibita** within the province of the legislature to enact. The legislature, drawing upon its knowledge of conditions inimical to the public welfare in the community and perceiving that solicitation of legal business by an attorney or by other in privity with him and acting in his behalf represents a social evil which for many years had been denounced as an unethical practice in the legal profession, had constitutional power to make such practice a criminal offense.

As construed, we do not find this statute to be so

vague, broad, indefinite and ambiguous as to render it unconstitutional. The legislative classification is confined to those particular persons and practices hereinabove indicated.

The cases relied upon by Petitioner do not appear to us to apply to the type of solicitation of legal business denounced in the statute under consideration.

Our decision herein is limited to upholding the validity of said statute and to the denial of the Writ and is not otherwise dispositive of any other questions of law or fact that have been or may be raised in the instant case.

The petition for writ of prohibition is denied. THORNAL, C. J., THOMAS, O'CONNELL and CALDWELL, JJ., concur

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APPENDIX B

FLORIDA STATUTES §877.02 (1)

> "It shall be unlawful for any person or his agent, employee or any person acting on his behalf, to solicit or procure through solicitation either directly or indirectly legal business, or to solicit or procure through solicitation a retainer, written or oral, or any agreement authorizing an attorney to perform or render legal service, or to make it a business to solicit or procure such business, retainers or agreements; provided, however, that nothing herein shall prohibit or be applicable to banks, trust

companies, lawyer reference services, legal aid associations, lay collection agencies, railroad companies, insurance companies and agencies, and real estate companies and agencies, in the conduct of their lawful businesses, and in connection therewith and incidental thereto forwarding legal matters to attorneys at law when such forwarding is authorized by the customers or clients of said businesses and is done pursuant to the canons of legal ethics as pronounced by the supreme court of Florida."

APPENDIX C

AMENDMENT XIV. CONSTITUTION OF THE UNITED STATES

"... No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX D

AMENDMENT I. CONSTITUTION OF THE UNITED STATES

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of

speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

APPENDIX E

AMENDMENT V. CONSTITUTION OF THE UNITED STATES

"No person shall be . . . deprived of life, liberty, or property, without due process of law; . . ."